

From: Hughs,Ruth R
Sent: Monday, June 04, 2018 3:55 PM
To: Jerry Valdez [REDACTED]
Cc: Bergmann,Kimberly <kimberly.bergmann@twc.state.tx.us>
Subject: Re: FW: Handy: TX

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Ruth R. Hughs
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Texas Workforce Commission
101 E. 15th Street
Austin, Texas 78778-0001
ruth.hughs@twc.state.tx.us
Office: 512-463-2800
Fax: 512-463-1289

From: Jerry Valdez [REDACTED]
Sent: Friday, May 18, 2018 3:31 PM
To: Hughs,Ruth R <ruth.hughs@twc.state.tx.us>

Subject: Fwd: FW: Handy: TX

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also, please let me know what day would work for us to visit by phone.

thank you very much.

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[REDACTED]

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512-694-7611 Mobile

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From: Jerry Valdez [REDACTED]
Sent: Tuesday, December 19, 2017 10:43 PM
To: Bergmann, Kimberly <kimberly.bergmann@twc.state.tx.us>
Subject: Fwd: Handy proposal

background info.

Jerry Valdez
[REDACTED]

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Texas

- **Background on the On-Demand Economy:**

- Technology is having a profound effect on the way we work and transact business:
 - The emergence of digital platforms is one of the most significant innovations, and one that impacts a lot of people on a daily basis—providing services like transportation, food and goods delivery, home cleaning, and others.
- The on-demand services sector is booming:
 - It is projected to grow by 18.5% a year over the next 3 years, from 3.9 million workers today to an estimated 9.2 million in 2021.¹
 - This growth is creating economic opportunities that didn't exist before; opportunities for flexible work with pay averaging \$25/hour.
- The on-demand sector is a critical and growing part of the economy, creating new opportunities for millions of workers across the U.S.
 - In fact, a recent study showed that alternative work arrangements, which include on-demand work, accounted for the entire net rise in overall U.S. employment during the economic recovery.²
- These opportunities are not confined to large, metropolitan areas.
 - According to a 2016 study, 39% of flexible economy consumers live in rural areas or small towns.

- **The On-Demand Economy Has Created New Flexible Work Opportunities that Are Highly Valued by Many People**

- The people who are providing services in the on-demand economy are drawn to it by the prospect of higher incomes and the increased flexibility and independence that their independent contractor status provides.
- The on-demand platforms are a particularly valuable option for workers who need or want flexible work arrangements. In the on-demand sector, workers can work two hours or thirty hours. They can take a week or a month off. They have complete control over their schedules and their careers.
 - For parents with small children at home, college students, and many others, the platforms provide opportunities for flexible work that simply did not exist before.

¹ Source: Intuit Forecast (Feb. 2017).

² Source: Lawrence Katz & Alan Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015" (Mar. 2016).

- In addition, for people saving for a mortgage down payment, a vacation, or other need, the platforms enable people to earn extra money on the side while keeping their regular jobs.
- **Need for Clearer Rules on Contractor Classification:**
 - The contractor relationship that underpins the on-demand model is at risk because of outdated and vague rules governing worker classification.
 - The laws that govern the classification of independent contractors were developed decades ago and never contemplated the new working arrangements that on-demand platforms have created.
 - As one federal judge addressing ridesharing put it, it's like "be[ing] handed a square peg and asked to choose between two round holes."³
 - As a result, there is no clear guidance for how to classify on-demand economy contractors, and companies are at risk of lawsuits and regulatory investigations.
 - This situation threatens the flexible income-earning opportunities and independence of thousands of contractors in the state who have flocked to the platforms for those qualities they provide, and also stymies continued growth and innovation in this important sector.
- **Overview of Proposal**
 - The proposal brings needed clarity to the rules governing the classification of workers in the on-demand sector.
 - It sets out an objective, nine-part test. If the factors are satisfied, the companies would have certainty that the workers that use their platforms are properly classified as independent contractors.
- **The Proposal Is Consistent with Current Law**
 - The worker classification issue primarily affects unemployment insurance and "wage and hour" issues such as those covered by the Texas Payday Law.
 - The Texas Workforce Commission has authority to interpret the scope of the Texas Unemployment Commission Act and the Texas Payday Law.⁴

³ Source: U.S. District Court Judge Vincent Chhabria, *Cotter v. Lyft* (N.D. Cal.).

⁴ See, e.g., *Harris County Appraisal District v. Texas Workforce Commission*, 519 S.W.3d 113 (Tex. 2017) (applying TWC's interpretation of term "employee," as set forth in TWC regulations, 40 Tex. Admin. Code § 821.5).

- Statutory provisions
 - Unemployment Compensation Act: The Texas Labor Code, § 201.041, defines “employment” as “a service … performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.”
 - Texas Payday Law: Under the Texas Payday Law, “employment” is similarly defined as “any service … that is performed for wages or under a contract of hire, whether written or oral or express or implied. The term does not include any service performed by an individual for wages if it is shown that the individual is free from control or direction in the performance of the service, both under any contract of service and in fact.” (Tex. Labor Code § 61.001(5).) “Employment” does not include services by an independent contractor. (*Id.* at § 61.001(3).)
- Thus, the test for whether a worker is an “employee” or an “independent contractor” turns on whether the workers are “free from control or direction” of the company.
- The TWC guidance for determining contractor status relies on a list of 20 factors. However, the TWC has made clear that no single factor is determinative and not all factors will apply in all cases.
- These 20 factors include factors such as:
 - Whether a worker must work hours set by the company;
 - Whether the worker works full-time or whether the company may have “a priority” on the worker’s time;
 - Whether the worker must work at the locations dictated by the company;
 - Whether the workers must undergo mandatory training to attend mandatory meetings;
 - Whether the workers furnish all tools, materials, and equipment;
 - Whether the worker pays his or her own business and travel expenses;
 - Whether the worker is paid hourly or by the job;
 - Whether the worker can work for competitors;
 - Whether the worker is required to provide written reports about the work in progress;
 - Among others.

- Because the TWC has discretion to interpret the term “employment” found in the statutes, TWC is not bound by the 20-factor test and is free to enact regulations that set forth a different standard. However, the proposed test for the on-demand sector in fact focuses on the same type of control factors reflected in the test.

Proposal

40 Tex. Admin. Code § 821.x. Employment Status: Marketplace Contractor

(a) For purposes of this section:

- (i) The term “marketplace platform” means a corporation, partnership, sole proprietorship, or other entity operating in this state that:
 - (A) uses a digital network to connect marketplace contractors to third party individuals or entities seeking the type of services offered by the marketplace contractors; and
 - (B) accepts service requests from the public only through its digital network, and does not accept service requests by telephone, by facsimile or in person at physical retail locations.
- (ii) The term “marketplace contractor” or “contractor” shall mean any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform’s digital network to receive connections to third party individuals or entities seeking the type of services offered by the marketplace contractor.

(b) A marketplace contractor shall be treated as an independent contractor, and not an employee, of the marketplace platform if all of the following conditions are met:

- (i) The marketplace platform and marketplace contractor agree in writing that the contractor is an independent contractor with respect to the marketplace platform;
- (ii) That all or substantially all of the payment paid to the contractor shall be based on the performance of services or other output;
- (iii) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third party individuals or entities submitted through the marketplace platform’s online-enabled application, software, web site, or system;
- (iv) The marketplace platform does not prohibit the marketplace contractor from using any online-enabled application, software, web site, or system offered by other marketplace platforms;
- (v) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;
- (vi) The marketplace contractor bears all or substantially all of the contractor’s own expenses that are incurred by the contractor in performing the services;
- (vii) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the services;
- (viii) The marketplace platform does not provide on-site supervision during the performance of the services by the contractor; and
- (ix) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.

Simmons, Tommy

Subject: Conference Call w/ Jerry Valdez and Tusk Strategies
Location: 888-296-6500 [REDACTED]

Start: Thu 12/21/2017 2:00 PM
End: Thu 12/21/2017 2:30 PM
Show Time As: Tentative

Recurrence: (none)

Meeting Status: Accepted

Organizer: Hughs,Ruth R
Required Attendees: Owens,Brian; Simmons, Tommy

Simmons,Tommy

From: Bergmann,Kimberly
Sent: Tuesday, June 5, 2018 7:10 AM
To: Owens,Brian; Simmons,Tommy
Subject: FW: FW: Handy: TX

Jerry is wondering if a time between 1-4 p.m. tomorrow will work for the call.

From: Jerry Valdez [REDACTED]
Sent: Tuesday, June 5, 2018 6:58 AM
To: Hughs,Ruth R <ruth.hughs@twc.state.tx.us>
Cc: Bergmann,Kimberly <kimberly.bergmann@twc.state.tx.us>
Subject: Re: FW: Handy: TX

hi Kim - Good Morning.

how about afternoon, sometime. maybe 1-4pm timeframe?

please advise. thank you. once confirmed, I will send out calendar item with call in info.

Jerry Valdez

[REDACTED]

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Physical Address
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let me round my folks in and be in touch.

Kim
what is better ? morning or afternoon ?

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Simmons, Tommy

From: Bergmann, Kimberly
Sent: Tuesday, June 5, 2018 8:23 AM
To: Jerry Valdez
Cc: Owens, Brian; Simmons, Tommy
Subject: RE: FW: Handy: TX

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Executive Assistant
Texas Workforce Commission
Commissioner Ruth Hughs
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Sent: Tuesday, June 5, 2018 9:38 AM
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From: Owens, Brian
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Subject: RE: FW: Handy: TX

Good here.

Brian Owens
Chief of Staff
Commissioner Ruth Hughs
Texas Workforce Commission
512-936-2772
Brian.owens@twc.state.tx.us

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How would 2 p.m. work?

Kim Bergmann
Executive Assistant
Texas Workforce Commission
Commissioner Ruth Hughs
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Austin, TX 78778

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Fax: 512-463-1289
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Jerry Valdez
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From: Simmons, Tommy
Sent: Tuesday, June 05, 2018 3:57 PM
To: Jerry Valdez [REDACTED]; Owens,Brian <brian.owens@twc.state.tx.us>
Cc: Bergmann,Kimberly <kimberly.bergmann@twc.state.tx.us>
Subject: RE: FW: Handy: TX

I can do that – if that works for you, Brian, we'll calendar it that way.

Tommy Simmons

From: Jerry Valdez [REDACTED]
Sent: Tuesday, June 5, 2018 3:55 PM
To: Owens,Brian <brian.owens@twc.state.tx.us>
Cc: Bergmann,Kimberly <kimberly.bergmann@twc.state.tx.us>; Simmons, Tommy <tommy.simmons@twc.state.tx.us>
Subject: Re: FW: Handy: TX

sorry. really sorry. lots of moving parts and lots of different people on this call. we need to do the call at 1 PM central.

again, my apologies. talk to you at 1pm.

can someone please confirm receipt of this change to the calendar ?

On Tue, Jun 5, 2018 at 4:09 PM Jerry Valdez [REDACTED] wrote:

good afternoon, all -
2pm Call tomorrow. see below.

Dial In Number 888-296-6500
[REDACTED]

On Tue, Jun 5, 2018 at 11:00 AM Owens,Brian <brian.owens@twc.state.tx.us> wrote:

Good here.

Brian Owens

Chief of Staff

Commissioner Ruth Hughs

Texas Workforce Commission

512-936-2772

Brian.owens@twc.state.tx.us

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From: Simmons,Tommy
Sent: Tuesday, June 05, 2018 9:38 AM
To: Bergmann,Kimberly <kimberly.bergmann@twc.state.tx.us>; Jerry Valdez [REDACTED]
Cc: Owens,Brian <brian.owens@twc.state.tx.us>

Subject: RE: FW: Handy: TX

It's good for me.

Thanks,

Tommy

From: Bergmann,Kimberly
Sent: Tuesday, June 5, 2018 9:30 AM
To: Jerry Valdez [REDACTED]
Cc: Owens,Brian <brian.owens@twc.state.tx.us>; Simmons,Tommy <tommy.simmons@twc.state.tx.us>
Subject: RE: FW: Handy: TX

How would 2 p.m. work?

Kim Bergmann

Executive Assistant

Texas Workforce Commission

Commissioner Ruth Hughs

101 E. 15th Street, Room 630

Austin, TX 78778

Phone: 512-463-9986

Fax: 512-463-1289

kimberly.bergmann@twc.state.tx.us

From: Bergmann,Kimberly
Sent: Tuesday, June 5, 2018 8:23 AM